

10 JUN 2013

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June 7, 2013

Via Certified Mail
Return Receipt Requested

The Honorable John McHugh
Secretary of the U.S. Army
101 Army Pentagon
Washington, DC 20310-0101

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: *Notice of Intent to Sue over Violations of the Clean Water Act in Connection with the Corps' and EPA's Approval of the Clydesdale Mitigation Bank*

Dear Sirs:

We write on behalf of the South Carolina Coastal Conservation League ("the League") to notify you of our intent to bring suit against the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA") for violations of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1344 *et seq.*, in connection with (1) the Corps' approval of the Final Mitigation Banking Instrument ("MBI Approval," attached hereto as Ex. 1) for the Clydesdale Club Mitigation Bank, (2) the Corps' authorization for work in the waters of the United States associated with this mitigation bank pursuant to Nationwide Permit 27, 77 Fed. Reg. 10,275 (Feb. 21, 2012) ("NWP 27") ("NWP Authorization," attached hereto as Ex. 2),¹ and (3) EPA's May 31, 2012 concurrence in the approval (attached hereto as Ex. 3). The Corps and EPA have violated Section 404 of the CWA, 33 U.S.C. § 1344, by approving the MBI and issuing NWP 27 authorization in contravention of applicable law and regulations.

As discussed in more detail below, the Corps and EPA have failed in their duties under the CWA. Citizens are authorized to remedy these failures through the Act's citizen suit

¹ The modifications made to this NWP on February 21, 2012 do not affect the claims set forth in this notice letter. See 77 Fed. Reg. 10,214-17 (Feb. 21, 2012) (discussing modifications made to NWP 27).

provision. 33 U.S.C. § 1365(a).² If the Corps and EPA do not take action within 60 days to remedy these violations of the CWA, the League will pursue litigation over these claims.³

I. Background

On April 16, 2013, the Corps granted final approval to South Coast Mitigation Group, LLC ("South Coast") to establish the Clydesdale Club Mitigation Bank in the Lower Savannah River watershed in South Carolina. The proposed site for the mitigation bank is a 694-acre tract of land adjacent to the Savannah National Wildlife Refuge. This area, which historically was comprised of freshwater wetlands, was impounded more than 200 years ago for purposes of cultivating rice. Since the end of the rice era, it has been managed as a freshwater wetland. South Coast proposes to breach the existing dikes and to remove the water control structures that are used to manage the freshwater wetlands at issue in order to "restore" about 485 acres of tidal saltwater marshes in this area.

Although South Coast characterizes its proposal as wetlands "restoration," the project would instead be a conversion of valuable freshwater wetlands into saltwater wetlands. In fact, the Army Corps of Engineers has built a canal to supply fresh water to this very site, in order to protect these freshwater wetlands from saltwater intrusion caused by harbor deepening. *See, e.g.*, Water Use Agreement, June 10, 1969, attached hereto as Ex. 6; Ex. 1 (MBI Approval) at 10-11. Thus, the Clydesdale Club Mitigation Bank proposal represents the dismantling of prior Corps mitigation efforts in the name of "restoration."

State and federal agencies, including the U.S. Fish and Wildlife Service ("FWS"), the National Marine Fisheries Service ("NMFS"), and the S.C. Department of Natural Resources ("SCDNR"), have each strongly objected to this proposal due to its mischaracterization as a "restoration" project, and because it will result in the loss of valuable freshwater habitat.

The Corps nevertheless made two unlawful authorizations necessary for the project to proceed under Section 404 of the Clean Water Act. The first allows the project area to be used as a mitigation bank, purporting to offset negative impacts caused by other Corps-permitted activities in South Carolina. This approval violates the Corps' own standards and criteria for the establishment of such mitigation banks, set forth at 33 C.F.R. 332.1 *et seq.* Corps regulations clearly exclude projects such as this one from the definition of "restoration." The second illegal authorization was the decision to authorize this proposed bank under NWP 27. Regulations

² Section 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), provides that any citizen may commence a civil action "where there is alleged a failure of the Administrator to perform any act or duty under this Chapter which is not discretionary with the Administrator." In *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988), the Fourth Circuit ruled that EPA and the Corps have the non-discretionary duty to regulate the discharge of dredged or fill material into wetlands and to "make reasoned wetlands determinations." *Id.* Although Section 505(a)(2) only refers to the Administrator, the Fourth Circuit held that "[i]t is quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms." *Id.*

³ The League is simultaneously filing a lawsuit under the National Environmental Policy Act and the Administrative Procedure Act, and is further sending a notice of intent to sue for violations of the Endangered Species Act in connection with the approval of the Final MBI and NWP verification. *See* Complaint, attached hereto as Ex. 4; ESA Notice Letter, attached hereto as Ex. 5.

applicable to all nationwide permits, as well as the specific terms of NWP 27, exclude habitat "conversions" such as this project from their coverage.

The Corps' decision was unlawful for one fundamental reason: characterization of the project as wetlands "restoration" is wholly unsupported by the record. First, the project cannot "restore" salt marsh to an area that has never been salt marsh. Second, this project would create salt marsh only by eliminating rare and valuable freshwater wetlands.

II. The Corps' Violation of its Duties Under Section 404 of the CWA.

Section 404 of the CWA authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into "waters of the United States" when certain conditions are met. 33 U.S.C. § 1344. The Section 404 permitting program is administered by the Corps. The term "waters of the United States" includes wetlands. 33 C.F.R. § 328.3(b) (Corps); 40 C.F.R. § 232.2(r) (EPA). Unless exempted by section 404(f)(1), all discharges of dredged or fill material into waters of the United States, including wetlands, must be authorized under a Section 404 permit issued by the Corps.

a. MBI Approval

When the Corps permits an activity pursuant to Section 404, the permit is often conditioned upon the performance of mitigation, to compensate for any unavoidable loss of aquatic resources caused by the activity. Corps regulations establish standards and criteria "for the use of all types of compensatory mitigation . . . to offset unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army ("DA") permits pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344) and/or Sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401, 403)." 33 C.F.R. § 332.1.

The preferred method for accomplishing such mitigation is the sale of credits from centralized "mitigation banks." A mitigation bank is "a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument." *Id.* at 332.2. According to Corps regulations, mitigation banks are preferable to individual permit-specific mitigation requirements, because "[m]itigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs." 33 C.F.R. § 332.3(b)(2).

Before a restoration project may be used as a mitigation bank, the Corps must approve the Mitigation Banking Instrument pursuant to the procedure laid out at 33 C.F.R. § 332.8.

1. The Corps erred in approving the project as “restoration.”

The Corps’ compensatory mitigation regulations define “restoration” as “the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.” 33 C.F.R. § 332.2. Both re-establishment and rehabilitation are defined as resulting in net gains in aquatic resources. “Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions. . . . Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.” *Id.* Thus, any “restoration” project must “return[] natural/historic functions to a former or degraded aquatic resource,” and must result in a net gain in aquatic resources.

The Corps’ MBI Approval fails to require that the project fit the above-described basic definitional criteria. Instead, the project will convert a freshwater wetland into a salt marsh. “The [Savannah National Wildlife] Refuge . . . objects to using the term ‘restoration’ when this is clearly conversion of one wetland type to another for the sole objective of selling mitigation credits.” FWS Letter to Corps, Jan. 14, 2011 at 1, attached hereto as Ex. 7; *see* SCDNR Letter to Corps, Dec. 9, 2011 at 4, attached hereto as Ex. 8 (“Conversion of wetlands does not equate to restoration of wetlands.”); SCDNR Letter to Corps, August 7, 2012 at 2, attached hereto as Ex. 9 (“[T]he site will not be restored by the proposed activities, but it will be converted, and to the detriment of important species.”) (Emphasis in original).

There is no “restoration” where the project area has never been a salt marsh, because the Corps’ own regulations define restoration as furthering “the goal of *returning* natural/historic functions to a former or degraded aquatic resource.” 33 C.F.R. § 332.2 (emphasis added). Neither the Corps nor South Coast has shown that the project area was once a salt marsh, that the project area is currently “degraded,” or that this project will result in net gains in aquatic resource function or area. *Id.*; *see, e.g.*, Ex. 7 at 2 (“The DBI itself confirms the area was tidal, freshwater marsh in describing past land use of the area.”); SCDNR Letter to Corps, July 17, 2012 at 2, attached hereto as Ex. 10 (“Prior to the September 28, 2009 public notice the subject property would have been classified as an impounded *wetland*. In fact, when it was impounded it was a *freshwater intertidal wetland* and it has remained a freshwater impounded wetland for at least 200 years.”) (Emphasis in original).

The Corps recognizes that prior deepening of the Savannah Harbor has changed the location of the saltwater/freshwater interface, resulting in increased salinity in the project area. Ex. 1 at 1-2, 14 (MBI Approval). Yet the Corps does not recognize the necessity of protecting freshwater resources from this unnatural saltwater intrusion. *E.g.* Ex. 1 at 14 (MBI Approval) (noting the expected impacts of the SHEP, and concluding with no explanation that “the restoration of natural tidal flows on the project site is considered beneficial regardless of the salinity.”). The Corps admits that the freshwater impoundment is made possible by a previous Corps *mitigation* project, *id.* at 10-11, but does not make clear that the essential purpose of this project is to undermine that mitigation. *Id.* at 8. The MBI Approval also minimizes agency and

public commenter contentions that the project area is historically a freshwater marsh, which now requires protection from saltwater intrusion. *Id.* at 9.

2. The Corps erred in failing to consider the significant negative impacts of the project.

The Corps has insufficiently considered the loss of valuable freshwater wetlands that would occur should this project go forward. As FWS stated, “485 acres of increasingly rare, functional, intact tidal freshwater impoundments and the associated fish and wildlife functions and values they are capable of providing will be impacted and irretrievably lost.” *See* FWS Letter to Corps, May 30, 2012 at 1, attached hereto as Ex. 11. The Corps responds to this and similar comments by noting that “[t]he proposed mitigation bank is located on a portion of the Savannah River/Back River that is dominated by tidal salt marsh.” Ex. 1 at 10, 16 (MBI Approval). Such statements do not meaningfully address the loss of freshwater wetlands and the unique services they provide.

Similarly, the Corps rejects requests that it require mitigation for the loss of these wetlands, noting that projects covered by NWP 27 generally do not require compensatory mitigation. Ex. 1 at 11-12 (MBI Approval). This begs the question by assuming that NWP 27 coverage is appropriate. It is not, as will be explained in greater detail below.

3. The Corps erred in failing to consider the objections of sister agencies and the public.

The Corps is required by law to meaningfully consider the objections and comments lodged by its sister agencies and the public. The district engineer is required to give “full consideration to any timely comments and advice of the [Interagency Review Team],” convened as part of the required regulatory process for approval of mitigation banks. 33 C.F.R. § 332.8(b)(4). Further, “[t]he district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank” *Id.* at (b)(2).

Letters from FWS, NMFS, and SCDNR show that these expert agencies had fundamental concerns about the project, and ultimately did not concur in its approval. *See* Ex. 7 at 1 (FWS “strongly objects” to this project.); Ex. 8 at 4 (“Permitting and establishment of this bank would be an arbitrary and capricious action that will set an unnecessary precedent with multiple unanticipated consequences based on the premise that mitigation banks can be approved on the flimsy premise that wetland conversion equals wetland restoration.”). NMFS wrote that the agency would have instituted formal objection proceedings, had it been able to staff such an endeavor. NMFS Letter to Corps, June 7, 2012, attached hereto as Ex. 12.

In its decision document, the Corps omitted the most important and fundamental objection, which is that expert agencies consider this project a conversion, not a restoration. The Corps states that “SCDNR and USFWS objected to the proposed project because they believe the existing freshwater impoundment should be actively managed similar to the Savannah National Wildlife Refuge (*i.e.* to benefit freshwater fish and wildlife values).” Ex. 1 at 20 (MBI Approval); *see id.* at 5-6. In fact, SCDNR and USFWS objected to the fundamental purpose of the project, stating that it is inappropriate for use as a mitigation bank because it represents a

For a number of reasons, the proposed mitigation bank and final MBI should not be approved under a NWP 27. First, NWP 27 should be used for activities that *restore*, enhance, or establish wetlands provided those activities result in net increases in aquatic resource functions and services. The proposed bank would restore, enhance or establish nothing; it merely would change the functions and services that already are provided by the existing wetlands at the site. . . . [T]he conversion wetland functions and values are no more valuable than the existing wetland functions and values.

Ex. 9 at 3. See Ex. 7 at 4 (“DNR does not believe a Nationwide 27 is the appropriate permit to use since the proposed project will not result in wetland restoration.”).

The comments to recent revisions of NWP 27 are in accord with the mitigation bank regulations defining restoration as the “returning” of “natural/historic conditions to a degraded or former resource.” 33 C.F.R. § 332.2. Those comments confirm that “re-establishment of submerged aquatic vegetation or emergent tidal wetlands” are authorized only “as long as those shallow water habitat and wetland types *previously existed in the project area.*” 77 Fed. Reg. 10,215 (emphasis added). The project area at issue here has never been a salt marsh; rather, it has always provided valuable freshwater wetland ecological services.

Because the project is not a restoration project, and for all of the other reasons articulated herein, the Corps’ has violated its Section 404 duties.

c. The 404(b)(1) Guidelines

Issuance of all Section 404 permits is subject to the Section 404(b)(1) Guidelines found at 40 C.F.R. § 230 *et seq.* These guidelines provide, *inter alia*, that no discharge of dredge or fill material may be permitted if there is a less damaging “practicable alternative” available, or if it will “cause or contribute to significant degradation” of waters of the United States. 40 C.F.R. § 230.10. The Section 404(b)(1) Guidelines further provide that “the degradation or destruction of special aquatic sites is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.” 40 C.F.R. § 230.1. Wetlands are considered “special aquatic sites” under the Guidelines. 40 C.F.R. § 230.41.

If implemented, South Coast’s mitigation bank would completely eliminate a valuable and rare freshwater wetland. The resulting saltwater habitat cannot justify or make up for this loss. The Corps’ approval of the MBI pursuant to its mitigation banking regulations and NWP 27 fails to account for the “irreversible loss of valuable aquatic resources,” 40 C.F.R. 230.1, involved in South Coast’s proposal. The approvals thereby violate the 404(b)(1) Guidelines militating against “significant degradation” and mandating special protection for wetlands.

III. EPA’s Violation of Its Duties under the Clean Water Act.

On May 31, 2012, EPA issued its “concurrence with the Clydesdale Club Mitigation Bank.” Ex. 3. Pursuant to the U.S. Court of Appeals for the Fourth Circuit’s decision in

National Wildlife Federation v. Hanson, 859 F.2d 313, 315-16 (4th Cir. 1988), "[i]t is quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms. . . . The EPA is ultimately responsible for the protection of wetlands." According to the Fourth Circuit, the Clean Water Act's citizen suit provision "should be interpreted . . . to allow citizens to sue the Administrator and join the Corps when the Corps abdicates its responsibility" under the CWA. *Id.* at 316. Because it has sanctioned the Corps' failures here and abdicated its ultimate responsibility to protect wetlands, EPA is also liable for the violations alleged herein.

IV. Conclusion

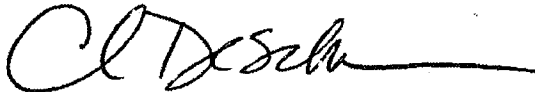
The Corps' and EPA's approval of the Final MBI and authorization pursuant to NWP 27 violate Section 404 of the CWA. If the Corps and EPA do not act within 60 days to correct the violations described in this letter, the League will pursue these claims in litigation in federal court.

Pursuant to 40 C.F.R. §§ 135.2, 135.3, you are hereby notified of the name and address for the organization giving this notice:

Dana Beach
Executive Director
SC Coastal Conservation League
P.O. Box 1765
Charleston, SC 29402
(843) 723-8035

In the meantime, if you have any questions or would like to discuss this matter, please feel free to contact the undersigned at 843-720-5270 or Southern Environmental Law Center, 43 Broad Street, Suite 300, Charleston, SC 29401.

Sincerely,



Christopher K. DeScherer

cc: The Honorable Eric H. Holder, Jr., Attorney General of the United States
LTC Edward Chamberlayne, U.S. Army Corps of Engineers, Charleston District
LTG Thomas P. Bostick, Chief of Engineers, U.S. Army Corps of Engineers
A. Stanley Meiburg, Acting Regional Administrator, EPA Region 4
Catherine Templeton, Director, SC Department of Health & Environmental Control
Ellison D. Smith, Smith, Bundy, Bybee & Barnett, P.C.

